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NO. 80-1356

IN THE

Supreme Court Of The United States

OCTOBER TERM 1980

Allan Rhoades and David Emmerling,

Petitioners

vs.

State of Arkansas,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

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QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER PETITIONER RHOADES' RIGHTS UNDER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION WERE VIOLATED BY A WARRANTLESS ARREST AND SEIZURE OF CONTRABAND MARIJUANA WITHIN HIS HOME AFTER AN UNDERCOVER LAW ENFORCEMENT OFFICER GAINED ENTRY TO THE HOME POSING AS A BUYER OF THE CONTRABAND MARIJUANA?

II.

WHETHER PETITIONER EMMERLING HAS STANDING TO CHALLENGE THE SEIZURE OF EVIDENCE IN PETITIONER RHOADES' HOME?

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OPINION BELOW

The opinion of the Arkansas Court of Appeals is found at 270 Ark. ____, 607 S.W.2d 76 (1980), and is reproduced in the appendix to the Petition for Writ of Certiorari at page 20.

JURISDICTION

The petitioner relies upon 28 U.S.C. §1257(3) as the basis of this Court's jurisdiction.

CONSTITUTIONAL PROVISIONS INVOLVED

The petition has adequately set forth the constitutional provisions involved.

STATEMENT OF THE CASE

The facts of the case are adequately set forth in petitioner's statement of the case.

REASONS FOR DENYING THE WRIT

The petitioners urge this court to grant a writ of certiorari on three related grounds, all based on *Lewis v. United States*, 385 U.S. 206, 87 S.Ct. 424, 17 L.Ed.2d 312 (1966), to wit: (1) that the Arkansas court's decision incorrectly interpreted the holding of *Lewis*, (2) that there exist conflicts between the federal circuit courts of appeal and some of the highest state courts in their construction of *Lewis*, and (3) that there exist conflicts between the *Lewis* decision and later decisions of this Court.

The respondent notes initially petitioner Emmerling's lack of standing to object to this seizure of evidence in petitioner Rhoades' home, in which he held no reasonable expectation of privacy. It does not appear that Emmerling had any proprietary or possessory interest in the Rhoades residence or even whether he had recently spent the night there. Merely being there with the owner's consent is not enough. In this regard see *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978), *reh. den.* 439 U.S. 1122, 99 S.Ct. 1035, 59 L.Ed.2d 83 (1978).

A reading of the cases relied on by the petitioners shows no compelling reason to grant the writ. The distinction made between *Lewis* and the present case is that in *Lewis* the evidence sought to have been suppressed was bought and there was no seizure, whereas in the present case the evidence sought to have been suppressed was seized, though it was contemplated being sold by the petitioners to an undercover law enforcement officer.

In light of this Court's recent denials of petitions for writs of certiorari in the case of *Baldwin v. United States*, 621 F.2d 251 (6th Cir. 1980), *cert. den.* ____ U.S. ____, ____S.Ct.____, ____ L.Ed.2d ____, April 6, 1981, and

Preces v. Florida, 378 So.2d 77 (Fla. App. 1980), *cert. den.* ____U.S. ____, 101 S.Ct. 569, 66 L.Ed2d 471, December 2, 1980, this distinction carries little weight.

In *Preces* virtually the same facts were present that are here present. An undercover officer set up a sale of marijuana with Preces, but seized the contraband and arrested the petitioner, both without a warrant, at the moment the sale was to have been completed. The Florida court affirmed on the basis of *Lewis*, 378 So.2d at 78, and this Court denied review.

In *Baldwin* an undercover agent gained employment from the petitioner as a chaffeur and general handyman and lived with him for six months, during which time the undercover agent seized four samples of cocaine. The trial court denied the petitioner's motion to suppress this evidence on grounds of Fourth Amendment violations, the Six Circuit Court of Appeals affirmed, citing *Lewis* and *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 202, 29 L.Ed.2d 564 (1971) and, as previously noted, this Court denied review.

The petitioners' contention that conflicts exist between federal circuit courts of appeal and the higher state tribunals is not borne out by the cases cited by him. The holding in *United States v. Dohm*, 597 F.2d 535 (5th Cir. 1979), rev'd. on other grounds at reh., 618 F.2d 1169 (5th Cir. 1980), is based on 18 U.S.C. §3109, though it does discuss *Lewis*. 597 F.2d 538. *United States v. Jones*, 292 F.Supp. 1010 (D.D.C. 1968), deals with electronic surveillance and is based on *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed. 2d 576 (1967). *United States v. Phillips*, 497 F.2d 113 (9th Cir. 1974), is distinguishable because the undercover agents in that case, unlike those in

Lewis and the case *sub judice*, took actions once within the building not "contemplated by the occupant," i.e. securing the building to await a search warrant after gaining entry via uniformed policemen purporting to investigate a burglary. *Lewis, supra,*

358 U.S. at 211.

The quote from *Patterson v. People*, 168 Colo. 417, 451 P.2d 445 (1969) is taken from the portion of the Colorado court's discussion of Patterson's contention that the undercover agent in that case should have advised him of his rights as soon as the agent had probable cause to arrest. *Hoffa v. United States*, 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374 (1967), deals with the admissibility of evidence of admissions made by an accused to one thought to be a friend, but who is actually a government informant who is not a law enforcement officer. That case is distinguishable from the instant case because the source of the evidence in *Hoffa* was not a policeman.

Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 99 S.Ct. 2319, 60 L.Ed.2d 920 (1979), is not in conflict with *Lewis*. In that case a team of police officers and the town magistrate responsible for issuing search warrants conducted a six-hour general search in which the search warrant was filled in as the search progressed, the members of the team opening and viewing merchandise without prior payment. *Lewis* was distinguished from that case on the basis that the official intrusion went beyond the purpose of the occupant in opening the premises to the public, i.e., selling films and viewing of films for prior payment only.

CONCLUSION

The petitioners have not demonstrated that the decision of the Arkansas Court of Appeals is in conflict with any decision of other state courts, federal courts or this Court. Rather, such decision was issued in accordance with well established and well reasoned precedent. For this reason and the reasons and authorities cited herein, the respondent submits that review by this Court is not warranted and that the petition for writ of certiorari should be denied.

Respectfully submitted,
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